



EMPLOYMENT TRIBUNALS

Claimant: Miss B Bury

Respondent: Premier Foods Plc

HELD AT: Manchester

ON: 12 December 2016
13 December 2016

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr B Norman, Counsel
Respondent: Mr O Brabbins, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal succeeds. There should be a deduction of 25% from remedy for contributory conduct. No uplift is awarded.

REASONS

1. The claimant brings a claim of unfair dismissal following her dismissal by the respondent on 6th May 2016. The claimant was dismissed for conduct in relation to mis-use of the respondent's instant messaging (IM) service and in the respondent's belief thereby creating a hostile and intimidating environment for a fellow employee.

Claimant's Submissions

2. The claimant submitted that whilst she conceded she should not have used the IM service for making personal comments about a colleague that there were strong mitigating circumstances and that further, as none of these messengers were ever seen by the colleague in question they could not be said to have created a hostile and intimidating environment for her. The mitigating circumstances were

inter alia frustration with a colleague's poor performance and the failure of management to act when this was brought to their attention, the fact that the claimant was under extreme work pressure and the colleague was making life more difficult that the claimant was dealing with her father who had dementia, that she had a clean disciplinary record and was a good worker in the seven years she had worked for the respondent, that she had admitted the offence and shown remorse and contrition. There was compelling evidence that she would not repeat her mistake again. She argued therefore that dismissal was outside the range of reasonable responses.

Respondent's Submissions

3. The respondents submitted that it was reasonable of the respondent to link the IM messengers to creating a hostile, intimidating environment and that it was within the range of reasonable responses to dismiss for the claimant's misuse of the system and a contribution to that hostile and intimidating environment. Mitigation was taken into account but was insufficient to suggest that an alternative penalty was appropriate. The dismissal was within the range of reasonable responses.

Bundle and witnesses

4. There was an agreed bundle and the Tribunal heard from for the claimant herself and for the respondent Miss Helen Gardener, HR Manager, Mr Rob Lancaster, Head of Payroll Fleet and Expenses who undertook the investigation, Mr Ian McCallister Head of Premier Business Services who held the disciplinary and Mr Duncan Leggett, the Financial Controller who heard the appeal.

Issues for the Tribunal

5. (i) Has the respondent established that the reason for the claimant's dismissal was a permissible reason under Section 98 of the Employment Rights Act 1996, in this case conduct is relied on.
- (ii) Where conduct is relied on has the BHS and Burchell test been met i.e. has the respondent demonstrated that it genuinely believed the claimant to be guilty of the misconduct alleged; were there reasonable grounds for such belief and did the respondent carry out a reasonable investigation.
- (iii) Did the respondent act reasonably in treating the reason as sufficient reason for dismissal, further. was the decision to dismiss within the band of reasonable responses of a reasonable employer.
- (iv) Was the dismissal procedurally fair.
- (v) If it was, if the claimant is found to have been dismissed for want of a procedural step to what extent if at all did it make a difference to the overall outcome and should the claimant's compensation be reduced accordingly.

- (vi) If the failure was not reasonable would it be just and equitable to make any uplift of any compensation award for the unreasonable failure of the respondents to adhere to the ACAS code of practice and if so, what percentage uplift should be made.
- (vii) To what extent, if any, did the claimant contribute to her dismissal and if so, what reduction in compensation is appropriate.

The Tribunal's findings of fact are as follows:-

6. The claimant began working for the respondent in April 2009, initially as a Profit Recovery Controller. Her job role changed to Commercial Administrator in April 2012 and again to Accounts Receivable Associate Major Multiples on 15th November 2012. The claimant worked in PBS, Premier Business Services. The claimant's employment as far as we aware was uneventful until 2016. The claimant had a clean disciplinary record, her performance was well regarded, I had no appraisals for the claimant but there were no suggestions that any difficulties arose in respect of her performance.

7. The respondent had a number of policies placed on their intranet in respect of which the claimant received no training, these were the usual policies for example a disciplinary policy, a harassment and bullying policy. There were also computer policies which included a policy about their Internal Instant Messaging Scheme. This was called the ICU User Security and Computing Policy and ;Procedure. During instant messaging usage the user's responsibility is stated as being "instant messaging services are to be used for business communication and for the purposes of fulfilling job duties, it is expected that all employees will communicate professionally at all times, the following activities are deemed inappropriate and therefore prohibited: use of instant messaging for illegal or unlawful purposes including copyright infringement, obscenity, libellous, slander, fraud, defamation or harassment, intimidation, forgery, impersonation and computer tampering". There was no further explanation of what these concepts meant.

8. Generally it was stated that infringement of the policy could result in disciplinary action. There was also a reference to the use of the words "must/shall/will" indicates that compliance is mandatory. Use of the words "should/may" means that compliance is expected all deviations from this policy are subject to approval by ISC".

9. In respect of employees being aware of this policy a notice would emerge when an employee opened their computer asking the employee to confirm that they had read this policy. The claimant said despite this she had never actually read the policy.

10. The respondent's disciplinary policy said that amongst other things gross misconduct was serious breach of the company's rules (including, but not restricted to, health and safety rules and rules on computer use). It also included bullying, harassment or abusive or threatening behaviour to a work colleague or member of the public however I would note that the respondents did not proceed under this section but the "serious breach" section. The respondent also had a definition of

harassment which included written or verbal and went on to include within that “gossip or slander”. They also had a Values policy which referred to bullying and harassment which said:

“in line with our core values belief that every employee should be treated with the same respect and dignity and we are committed to providing a work environment that is free from bullying and harassment.

We will not tolerate bullying or harassment in the workplace either as a management style or between work colleagues and will take disciplinary action against any employee who is proven to have bullied or harassed others”.

11. This is also reflected in the Values competencies for the purposes of any appraisal where there was a competency to show respect for differences in ideas, experiences, personality styles and cultures and value all forms of diversity, to trust each other and to act with positive intent.

12. In July 2015 a temporary worker – Miss Rowena Goodwin - starting working with the claimant and her colleagues. The claimant and her colleague Sharon Gallagher were responsible for two of the busiest teams within the PBS section and accordingly it was expected they would give Miss Goodwin most work. The claimant however became very frustrated with Miss Goodwin as she was slow to learn how to do things. The claimant felt that Miss Goodwin did not help herself as she would not take notes. She also felt that she wasted a lot of time on smoking breaks, did personal work whilst at work such as writing Christmas cards, pursuing claims she had against various organisations and making personal phone calls. She complained to her manager about this, Mr Terry Jakeway but he did nothing about it. However when Miss Goodwin complained to Mr Jakeway (about not getting enough work or not being given proper deadlines) he introduced a new system of allocating work so that it was clear what deadlines were required and exactly what the work was and this seems to have been reasonably successful.

13. However Miss Rowena Goodwin on the 18th January 2016 wrote a letter to Mr Jakeway say that she had decided to hand in her notice, she said “I know you have done your utmost to improve relations with the team Terry and I recognise in some ways you have succeeded but as I have mentioned on many occasions – although Sharon can no longer bully or intimidate me in relation to work she continues to use more subtle tactics i.e. she totally ignores me, only offers to make a drink for the team when I move away from my desk so she can leave me out, she always refuses to have a drink when I offer to make one for the team, I returned to my desk too early one day and she was handing chocolates round to the rest of the team, she saw me and looked the other way and quickly returned to her desk without offering me a chocolate too, the examples I have given probably sound minor problems compared to what was happening below but believe me Terry it does not feel that way when you are at the receiving end of this kind of treatment on a daily basis. There was also a recent issue where I had to send an email to you because I was upset that I had asked Sharon for work and she told me she did not have any then approximately 30 minutes later Jill asked her and she gave Jill work and sat with her for several hours showing her what to do. It was upsetting and embarrassing. Since the day I

arrived at Premier Sharon has used every opportunity to make my life as uncomfortable as she can possibly make it and she has continued to do so, I am not the first person Sharon has targeted and I am sure I will not be the last although I realise I am only a contractor I do think this matter should have been addressed and monitored by HR from the outset”.

14. At this point in time Miss Goodwin was offered a alternative role in a different team and she accepted that at first. However she was then off on holiday and did not return to work on the Friday she was expected to. Instead she emailed her contact at her agency a Lydia Randall, (copied to Darren Mulhear, one of the managers at Premier Foods) on 31st January stating that she was not going to return as she had been reduced to tears in the workplace and made to feel ill. She also said she had been looking to take the matter down the legal route (however how she would do that was never quite made clear). She identified Sharon Gallagher as the person who was bullying her.

15. In this email Miss Goodwin stated “I have decided not to continue working for Premier I should have returned to work on Friday but I just could not put myself through it any more, I am sorry for letting you down Lydia but I have put up with constant bullying on a daily basis over seven months at the hands of one woman and her friend (to a lesser extent) and my confidence is on the floor and I know if I continue to work there I would end up having a complete breakdown because I came pretty close to it before I left there and it is going to take a while to rebuild my confidence even though I have taken a week’s break from it I am still not right”. She went on to say she had attended the doctors begging for anti depressants but the doctor had said she needed to resolve the situation, she said she should have been treated the same as permanent staff even though she was only a contractor, she stated she had complained on numerous occasions to her immediate managers who knew that the main culprit had a history of bullying and had bullied at least three other members of the team but they did not treat it seriously and refer it to HR and she mentioned that Sharon Gallagher was the person she was complaining about. She said that she asked if she and Sharon could be brought together and she felt this would have resolved it but this was not done. She said that she felt the offer of a move to a different team was not right and she would still be in Miss Gallagher’s proximity. She said “I have been looking into taking this matter down the legal route Lydia because I owe it to myself and hopefully by doing it will ensure that what happened to me will not happen to any other poor unsuspecting soul in the future”.

16. This was passed on to Helen Gardener from HR and she offered Miss Goodwin the chance to meet with her to discuss further with a view to investigating, she did not have to come to the office to do so.

17. On 3rd February Miss Goodwin wrote to Miss Gardner and said:

“Thank you for your email, Terry will have copies of all the emails I have sent him documenting what was happening and also notes of the meetings I had with him..... Darren will have logged what was happening following meetings I had with him. Other members of the team who spoke to Darren and Terry regarding this matter are Anna, Pam and Jill ... the names of the person who has constantly bullied and intimidated me for seven and a half months I

worked at PBS is Sharon Gallagher and she was almost always supported by Bev Bury however I must say that Bev was fine when Sharon wasn't around or away from work, for want of a better word Bev always sucks up to Sharon. The moment you meet the team you know immediately there is an us and them situation.... Thank you for the offer to meet with me but in the last seven and a half months I have tried so hard to get the matter resolved sometimes things were so bad I had been in tears to both Darren and Terry and nothing ever really changed it has taken my leaving for it to get to HR. It's so wrong I really think I have talked enough to people about what happened I just can't see the point in my going through it all again when I have been through it time and time again with the managers, I really haven't got it in me to go through it all again knowing that Sharon will get off scott free yet again she always does The managers should be told that bullying and intimidation are serious and should be dealt with by HR because managers are not usually qualified to deal with those situations. You only have to look at what happened to me and the suffering I have endured because the correct procedures were not followed".

18. She then wrote another email on 4th February which stated that somebody at the respondent had told her that they were only looking into it because they thought she might bring a bullying claim and that she was upset about that and would now be definitely going down the legal route. Helen Gardener replied denying this and saying they wanted to properly investigate it. Again, Miss Goodwin replied saying that she had little faith in Premier's grievance procedure "at the end of the day I had to lose my job for the matter to be investigated". She went on to say "it's not Helen's fault because she had said to Terry that bullying and intimidation should have been dealt with and monitored by HR from the outset. He said it had been discussed but there wasn't enough evidence, I couldn't believe he said that there was plenty of evidence anyway hopefully if the matter is investigated at least it will prevent it from happening to anybody in the future".

19. The respondents never went back to Miss Goodwin to ask her any further questions, they said that she had made it clear she did not want to be involved however reading those emails she had made it clear she did not want to meet with Miss Gardener but it was not at all clear that she would not answer any specific questions.

20. Helen Gardener then acted as note taker while Margaret Bingham launched an investigation on 1st March by interviewing a number of witnesses, mainly the ones suggested by Rowena Goodman. The questions asked were "when did Rowena first mention to you she felt bullied, harassed or intimidated, did you bring this to anyone else's attention, when and how were you made aware Rowena had resigned and the reason for her resignation, did you discuss this with anyone else, did you ever speak to anyone else about the bullying intimidating harassment in the office, did you ever speak to the person doing the bullying".

21. Pam Gadawar said that Rowena had said people had been nasty and making snide comments and that Pam had reported this to Darren, that she had encouraged Rowena to have a go on the other team because she was a good manager. She said she felt Anna Vukasinovic had gone through a similar thing before, she didn't

she speak to anyone during the bullying as she didn't want it to turn on her. Anna Vukasinovic stated that Rowena had said that she felt bullied etc throughout the whole time, that there was a lack of organisation with her training and giving her work and that is why Terry had set up the tracker. She went on to say "I know Rowena spoke to Terry about the way she was being spoken to and the whispering, I can remember them talking about Rowena negatively i.e. complaining about her going for cigarette breaks despite others going for a break too, its playground stuff they did it to everyone but Rowena is unique and so it was easy to single her out, if you can get copies of the IM's between the team members you will be able to see the comments, times and dates". She said she had been the butt of everyone before Rowena started and she had spoken to Darren about Lynne and Sharon bringing the team down but she did not want to go any further, and she had mentioned it once to Terry in passing.

22. Gillian Norris said that Rowena had mentioned that she was being bullied around the beginning of December, comments were made to make her feel incapable, Terry Jakeway knew it and that when she had no work Gillian had offered to give her some of hers but the person who put the work out to Gillian i.e. Bev (the claimant) was put out that she had asked Rowena. Terry acknowledged this, it had been highlighted previously and he mentioned it in a meeting and then they (Bev and Sharon) started to behave after she had raised the matter with Terry, and said they are like children in the playground best to stay out of it. There was an obvious division in the department and from what she had seen Rowena bore the brunt of it.

23. Terry Jakeway was interviewed, he said that he knew Rowena had spoken to Darren but she did not mention bullying and harassment at the time, it was about a clash of personalities between her and Sharon, she never mentioned anyone else but complained about not being given work to do. He said he had spoken to her and Darren about what they were going to do and decided to have a one to one with Sharon Goodwin about how she came across. Mr Jakeway said that he spoke to Sharon Goodwin on 20th October regarding her behaviour and treating everyone the same. The next day she said she did not want to upset anyone and he repeated to her to be more aware of how she came across.

24. Mr Jakeway said he spoke to Rowena on 21st October to bring up to speed on what had been said to Sharon and new ways of working with the log book. This was then implemented on 10th November following a team meeting and Rowena commented after that that she liked that way of working as it was more structured. He was unaware she was seeking medical help other than for a cold or chest infection and although Rowena had asked for mediation Darren felt it was better to talk to her and Sharon separately. There was nothing stopping her i.e. Miss Goodwin taking it to HR herself. He said she had resigned on 18th January and when he had spoken to her he had offered her a position in Sam's team which she accepted, he commented "she would not have accepted that if bullying was that bad". Further that the email resignation was the first time the word bullying was mentioned. He stated that he did not raise it with HR as the allegations she raised were not deemed bullying in his and Darren's view. He said the only thing that he was aware of from Lynne, Beverley and Sharon's side was about her working style and not making notes, no one has made any personal comments made about Rowena behind her back. He said he was aware that there is a bit of a clique

between Michelle, Sharon, Lynne and Bev and he tried to build the team and will carry on doing so.

25. Darren Mulheir was also interviewed. He also said Miss Goodwin had not mentioned bullying just that she had not been getting enough work. When he spoke to the team about it they said they were concerned about her not taking notes when she was being trained. He discussed it with her following the 16th October and that she felt not involved in tea rounds and felt left out, she just felt excluded, she did not use the word bullying, she said for example Sharon was handing out chocolates when Rowena was not there and when she came back to her desk Sharon sat back down and did not offer Rowena any.

26. Darren Mulheir stated that there had been a similar occasion before when Pam had said that Sharon was "off" with Anna, he got them in the room and Anna said she did not want to take it any further, the comments were about Anna's approach to her work. He said he had never seen Rowena being bullied or harassed by other members of the team, and he was not aware Rowena was seeking medical help due to the situation she faced at work. He commented that Miss Goodwin never said she wanted it taken to HR, that there had been a suggestion she move to Sam's team and at first she was grateful for that opportunity and it was communicated but then she decided not to take up the offer and resigned instead. He was not aware of any personal comments made about Rowena on IM by Bev, Michelle, Sharon or Lynne. He did not flag up the 18th January email to HR as he and Terry thought she was happy with a move to Sam's team. He said he would not be surprised if Sharon's attitude was taken the wrong way, she could be more personable, she was a strong worker and probably expects those standards from others.

27. The claimant was also interviewed. She said she thought morale on the team was OK, it was good and that her relationship with Rowena was professional, she said was she aware that Rowena felt bullied, harassed or intimidated. She was aware that a complaint had been to Darren but it was an isolated incident about her being asked to distribute the post which she did wrongly and Sharon laughed and said that she did not believe she didn't know it had to be split up to different people. She had given Terry and Darren feedback on Rowena's capability saying "she was not getting it right", She complained that Darren did not do anything. She gave feedback to Terry about three times that she was a poor performer compared to Jill who was a much better performer and this highlighted the difference there were also issues with her timekeeping - she spent time at work on cigarette breaks, shop breaks and personal calls. She was asked if Darren or Terry did anything about her concerns, she said that no they did not apart from organising the spreadsheet, the claimant said she believed Miss Goodwin's performance did not improve after that and that she tried not to give her work as she was not certain it would be accurate. She agreed she discussed Rowena's performance with other members of the team but not in front of her and she was only aware of one incident where she made Rowena feel uncomfortable where Rowena accused her (the claimant) of laughing at her which was not true and she could not have seen this anyway but she felt after that she was careful around her. She made additional comments that people were reluctant to give Rowena work and that she was spending a lot of time typing up a legal document around her claim against a Council, that she had fallen asleep twice

in meetings in September and that she complained that she had not been trained on things which she had but she failed to take notes and they had to keep repeating matters.

28. In respect of the instant messages because Anne Vukasinovic had mentioned this Helen Gardener did then explore the instant messages, she did this by putting the team members name in and then searching by reference to terms such as hate, dislike and some of the nicknames from reported interviews from other team members such as ET, Harold Bishop and Alien and then put in a further search. She said it became clear a number of individuals were using the respondents' IM system to privately communicate between themselves on matters unrelated to work and some unkind and vile comments aimed directly at Miss Goodwin and others such as Gillian Norris had been made.

29. Helen Gardener then had a meeting with Rob Lancaster and Ian McAllister and she asked Rob Lancaster to undertake an investigation. He interviewed the claimant on 19th April as part of the disciplinary process.

30. The letter inviting her to that meeting stated "following evidence that has come to light during a currently ongoing grievance investigation I am writing to confirm that an investigation into allegations of serious misconduct namely unprofessional and inappropriate use of Premier Foods Instant Messaging System in contravention of the IS Users Security and Computer Policy has been commenced, the investigation will be carried out by Rob Lancaster and you are invited to an investigatory meeting on Tuesday 26th April".

31. The claimant at this initial interview said she regretting sending and apologised and said "we were completely frustrated by our colleague who wasn't competent in the role she was in", she said she did not particularly recall the IM exchanges and they were meant flippantly in a text message way. She agreed that it was not professional but she had raised all the issues through the correct channels and nothing was done about it. It was hard when they were incredibly busy and she had had to take extra time to correct Miss Goodwin's mistakes and that she correctly raised issues with her to Terry. Mr Lancaster said he explained he had seen the notes from the original investigation (i.e. the grievance) and understood that. He pointed out that instant messaging was a business tool, she said she had never read the policy. She asked to interview Lisa Gaffney and Michelle Frakker who she felt would support the points she was making.

32. It was then Helen Gardener and Rob Lancaster's evidence that they met together with Ian McAllister and it was decided that the matter should go to a disciplinary hearing. Miss Gardener was at pains to say that Mr McAllister was not part of that discussion but came along later. However due to the discrepancies between the evidence on this matter which I believe must have arisen because the respondents realised Mr McAllister should not have been part of the discussion at this stage I find that indeed he did contribute to that discussion.

33. When the claimant received the invitation to a disciplinary hearing the allegation had changed to "the allegation is that you committed a serious breach of the company rules by your unprofessional and inappropriate use of Premier Foods

Instant Messaging System in contravention of ISC User Security Computing Policy which is contributed to, or is evidence in relation to harassment of staff members creating a hostile, intimidating atmosphere. The basis of this allegation is that following a grievance raised by Rowena Goodwin alleging harassment during the course of her employment we carried out an investigation and as a result have discovered the instant messaging exchange you and a number of colleagues had engaged in". The investigation undertaken by Robert Lancaster had not considered the second part of that allegation i.e. that the IM messaging had contributed to creating a hostile, intimidating environment. As there was no minute of the discussion with Helen Gardener, Ian McAllister, Rob Lancaster it is not clear how that additional issue was added in, nevertheless it was added in.

34. Following her suspension the claimant asked Miss Gardener for clarification as to whether she was being investigated for the use of instant messaging or for Miss Goodwin's grievances, she requested the statements of Anna, Pam and Jill if they had been interviewed in the grievance or investigatory process, she was not sure at this point whether they had been interviewed but Miss Gardener refused to provide any interviews in relation to Rowena Goodwin's grievance and the subsequent investigation notes as this was a separate matter. The email detailed the matter was in relation to "alleged unprofessional and inappropriate use of Premier Food's instant messaging system". After that the claimant presumed that the issue still was just the instant messaging and that the disciplinary hearing that Mr McAllister had confirmed that this was the issue.

35. There was then some confusion and the claimant thought that she was just answering a charge on the instant messaging however I am satisfied that although there is some ambiguity the respondents had made it clear as they could that it was both matters. The disciplinary hearing was then held with Ian McAllister on 3rd May.

36. At the hearing the IM comments were discussed for example, one from November 2015 when the claimant felt that Miss Goodwin had been talking for an extremely long time, that Linda Watkinson messaged her to say that she had not come up for air and the claimant responded "I said may be she'll stop breathing then !!!". The claimant said it was not meant to be hurtful but was in response to Miss Watkinson. She said she made comments in December because the claimant was sat at her desk writing Christmas cards in work time. In January Miss Watkinson had stated "give Dopey a prod with the stick" and the claimant replied that "she would lend her a dagger", again she said this was an ongoing joke about poking people with a stick which had been left in the office if they weren't working hard enough and obviously the dagger comment was unkind. In addition in January Miss Goodwin had walked into the office smelling strongly of smoke and the claimant began coughing continuously. Rowena also took numerous cigarette breaks again interfering with her work. The claimant said she noticed Miss Watkinson who sat nearer to Miss Goodwin was particularly annoyed with the coughing and she made the comment "don't worry she'll soon be dead". The claimant argued that this seemed worse than it was out of context. The claimant however always maintained that she treated Miss Goodwin properly in particular in December 2015 Miss Goodwin told her that her mother was ill and she and the claimant would regularly ask her how her mother was in order to maintain a cordial relationship with her.

37. Whilst Linda Watkinson said she hated Rowena, the claimant had not said that she did not hate her. She did not like her because she was a non-performer, because she did not take ownership when they were super busy and somebody brought into help was actually creating more work. She said they were fast and flippant comments because it was quicker to IM and they were not indicative of the claimant's actual behaviour towards Rowena.

38. At the hearing the claimant made further points, firstly she apologised immediately and there was no intent to harass or create a bad atmosphere, that she did not mean it and that they were flippant messages and attempt at humour borne out of frustration and were a way of letting off steam. It was not indicative of her behaviour towards Rowena, she asked her every morning from mid December to the end of January how her mother was as she was ill. There was no spiteful atmosphere. The allegation was a serious breach of the policy, she did not believe it was a serious breach as only one of the items under user responsibilities referred to as "harassment" and from the wording she understood it was direct harassment that was being referred to not indirect harassment. She had seen no examples of how Rowena alleged she had been harassed by herself and there was no evidence presented in the investigation of a bad atmosphere at work.

39. The claimant also referred to mitigating circumstances. She said that she had got a great record, seven years with the respondent with no complaints or warnings, she had never had any issues in her twenty six year career, she has received positive feedback but the team workload was high and that all staff members were stressed, three had been prescribed beta blockers, that there were issues with Rowena's timekeeping and performance were raised to Darren and Terry that although they created a spreadsheet of her tasks it did not lead to an improvement in her work. Further Darren and Terry did not refer any complaints to HR either those of the claimant or those of Rowena. She gave a specific example of Rowena giving a false accusation and said she was very careful with her after this which she found stressful but it showed that Rowena was not a reliable Witness. She had extra stress as a result of the work involved in checking Rowena's work and correcting her errors, the text messages were not directed towards Rowena, they were private and not in the public domain, a way of letting off steam and her behaviour towards Rowena directly was always professional.

40. She described the tone of the messages as light hearted banter, joshing at colleague, using black humour, they were not serious, they were exaggerated for comic effect. Informal use of instant message was wide spread and they were just passing thoughts.

41. The respondent accepted that Miss Goodwin was a poor performer, Mr McAllister in the hearing said he was concerned that the comments were spiteful such as "stamp on the cake", this was a reference to a potential of Rowena Goodwin having a leaving cake when she moved to "Sam's team". The claimant said this was silly - clearly she would not do that but it was at the point when Miss Goodwin was moving teams and she was very frustrated with her. She agreed she should not have used IM for that but she said there was widespread use throughout the company for non-work matters and she was frustrated because Darren and Terry

had not done anything about it. Neither was there a culture was bullying or intimidation across the PBS team.

42. Mr McAllister said it “feels like a propensity that people think its ok to be rude, derogative and spiteful creating an intimidating and harassment environment”. She agreed they were unkind and flippant but she did not believe the message created a bad atmosphere, she was very conscious about her behaviour towards Miss Goodwin after the incident. He asked if there was an intention to be mean towards other members of the team. The claimant said “no it was frustration there was not a bad atmosphere because the messages were an outlet, they were never sent to Miss Goodwin and “she never saw them”. Mr McAllister said it did not matter whether she saw them or not they are not in keeping with the respondent’s values. The claimant agreed that was important but it was not direct harassment. Mr McAllister said eventually that he did not think that that made a difference, he said “the fact that you and others write like this. The comments you are saying now demonstrates that you think it does not create an atmosphere, people are writing these types of messages I have to ask if people think its ok to write like this”. The claimant said she was letting off steam, she knew what it was like to be bullied at work and that she did not do anything to undermine Rowena Goodwin at work. Mr McAllister said that Miss Goodwin had mentioned a bad atmosphere in her resignation (which in fact she did not specifically) and it was not the use of the instant messaging causing the atmosphere but the context and contents of the messages creating a hostile environment. The claimant said she did not believe there was a causal link between the IM messages and any hostile environment and there was no evidence suggesting a link.

43. Mr McAllister said that was why he said there was a propensity - if you are willing to write these things over a prolonged period of time about many members of the team then its right to assume that a negative culture is being built and created. The claimant said she was never going to do it again, they were just like comments people make at the water cooler every day and not to be taken seriously. She said it did not create an atmosphere and she would never have said it to the person, there was a massive boundary between a flippant comment to a colleague and saying something to somebody to their face.

44. Mr McAllister wrote to the claimant giving her the outcome of the disciplinary hearing on the 6th May, he said that “I find both allegations amount to gross misconduct individually, you admitted to sending the messages and acknowledged that they were not in any way suitable for an office environment, I find the contents of the IM messaging themselves were clearly in breach of the policy. As you are aware Rowena Goodwin has alleged that the office atmosphere reduced her to tears, thankfully Miss Goodwin is unaware of the IM messages that you have sent and which you confirmed they were often targeted at her, nonetheless I find the messages were indicative of your attitude towards her and are entirely consistent with the manner in which Miss Goodwin asserts she had been treated. I conclude therefore that Miss Goodwin’s account is credible and on balance I prefer her account to yours. I believe you and your colleagues have clearly created a hostile and intimidating environment as she alleged, I also consider that in sending the IM messages you were reckless as to the consequences of someone seeking them and the impact they would have had if seen by Miss Goodwin or your current colleagues

or reported by a colleague. I find that your conduct taken as a whole amounts to harassment on your part". In the Tribunal Mr McAllister was asked whether he considered the claimant's mitigation and as part of that whether or not he had considered whether it was likely the claimant would do it again. He agreed there was no evidence she would do it again but stated there was no evidence she would not do it again. Nevertheless there was no evidence that any of this was discussed in the disciplinary hearing.

45. On 9th May 2016 the claimant wrote to Helen Gardener and said this was an enormous shock that she needed to appeal but she had a few questions, what is the status of the grievance on bullying and intimidation by Rowena, is Rowena's allegation of bullying and intimidation and harassment against me, did Ian interview Rowena, can I bring an Employment Lawyer to my appeal, is it a re-hearing or appeal against the decision?.

46. On 9th May 2016 Miss Gardener replied saying the grievance had not been concluded and, that she had been mentioned in the grievance and that Ian did not interview Rowena as she would not attend an interview as she was too distressed. Miss Gardener advised the claimant she could not have an Employment Lawyer with her but she could have an ex-colleague or a trade union representative and that the appeal hearing would be a complete re-hearing.

47. The appeal took place on 23rd May with Duncan Leggett hearing it. The claimant had no representative or colleague there. The grounds of the appeal included that the hearing was procedurally unfair as there was only one allegation of misconduct made against her but the hearing was treated as two allegations, the second being the unsubstantiated and unspecific allegations made by Rowena in her email. She felt she had not given proper notice that this would be considered, that she could not question Rowena regarding her evidence such as it was or put forward a defence to her allegations as she could not call witnesses to refute matters set out in her email. The allegation was so vague and unspecified in relation to the claimant that she would not be able to defend herself and it was unfair to give evidential weight to Rowena's email. The decision was also based on matters and evidence of which she had no notice and could not respond to. Further, that her misuse of IM was not severe and there was no causative link between the unproven allegations of Rowena and her messages to a third party, it was accepted that Rowena had no knowledge of the messages. It was also wrong to categorise the breach as serious as the policy did not define what a serious breach was and it was wrong to interpret this by reference to harassment as that must have been intended as direct harassment whereas at the most she had done was indirect harassment.

48. Further it was wrong to make any finding in relation to the harassment of Rowena, she had admitted she used the IM unprofessionally but not that it was a serious breach of the IM policy. The punishment was too severe as it should not have been gross misconduct or a dismissible offence, alternative disciplinary sanctions were not considered such as a verbal or written warning and that would have been more consistent with the gravity of the offence and sufficient weight was given to issues raised in mitigation such as her exemplary work record, her personal circumstances and she would address the appeal in more detail.

49. Mr Leggett said that he gave the claimant full reign to make her points but that he struggled to see the humour in her comments and said he was troubled that she appeared not to recall the exchanges and which she had described as “flippant and like text messages”. He felt this potentially indicated it was normal behaviour and he was concerned by this.

50. Mr Leggett upheld Mr McAllister’s decision and his outcome letter of 26th May 2016 stated “I have considered all of the evidence presented at the disciplinary hearing and your detailed assertion ... you do not deny having made the comments and those comments were severe and vile which I do not accept were intended as humour as your claim. Despite your evident frustration with what you believe was the inaction of Miss Goodwin for which you went into significant detail in the appeal this does not mitigate the severity of what was said, I was surprised and concerned that you did not appear to remember such comments during your disciplinary hearing and believe that this is further evidence that the messages are indicative of your behaviour and contributed to creating an intimidating and hostile atmosphere, the fact that you did not think anybody else in the office would see the written messages does not lessen the severity of what was said and I find that you were reckless as to whether any of your colleagues could have seen them. Your use of electronic messages is also a clear misuse of company property and in breach of the policy”. Mr Leggett referred to considering the claimant’s mitigation but he said he believed it was not sufficient to reduce the sanction of dismissal.

51. There had been no discussion in the appeal hearing at all about whether Miss Goodwin had seen the messages. The claimant went into some detail in the Tribunal hearing regarding how the messages were used, she said they would pop up as a small box in the bottom right hand side of the screen and she did not believe they could be seen by somebody else, once they were clicked on they would disappear. She said if some would remain on the system she was unaware of which remained and which didn’t as some did seem to have disappeared. If she sought to look she said she always closed her computer down and did not believe that Miss Goodwin would ever have seen the messages but she agreed she could not explain how Anna Vukasinovic was aware that comments had been made over instant messaging but neither could the respondent explain how she was aware. The claimant accepted that she realised that the comments were inappropriate at the time and she did take steps to ensure no one saw them and she believed that her IM correspondent (which was mainly Linda Watkinson) was also careful in the same way.

The Law

52. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

“A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee.”

53. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

“The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

54. In relation to a conduct dismissal **British Home Stores Limited v Burchell** sets out the test to be applied where the reason relied on is conduct. This is:

(a) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?

(b) were there reasonable grounds on which to base that belief?

(c) was a reasonable investigation carried out?

55. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

“...is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.”

56. The Tribunal must not substitute its own view for the range of reasonable responses test.

57. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent’s own procedure. In **Sainsbury’s PLC v Hitt [2003]** the court established that:

“The band of reasonable responses test also applies equally to whether the employer’s standard of investigation into the suspected misconduct was reasonable.”

58. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

59. In addition, if it is found that the claimant's dismissal was unfair, in relation to remedy the following issues must be considered (**Polkey v A E Dayton Services [1988]**). If the Tribunal finds there was a failure to adopt a fair procedure and the consequence was that dismissal was unfair then the Tribunal can consider whether, had a fair procedure been followed would the claimant still have been dismissed? If the procedure failings were so severe that no reasonable employer acting reasonably would have dismissed the claimant then **Polkey** does not act to reduce any compensation.

Contributory Conduct

60. Section 123(6) of the Employment Rights Act 1996 says:

“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the...compensation award by such proportion as it considers just and equitable.”

There must be a causal link between the blameworthy conduct and the dismissal.

Wrongful Dismissal

61. An employer may summarily dismiss an employee only if the employee is guilty of gross misconduct, otherwise there is a breach of contract giving rise to a claim for wrongful dismissal. The damages for wrongful dismissal are generally the notice pay to which the claimant is entitled.

62. The primary case on what constitutes gross misconduct is Lords –v- London Chronicle (Indicator Newspapers) Limited 1959 where Lord Evershed M R stated that “one act of disobedience or misconduct can justify a dismissal only if it is of a nature which goes to show in effect that the servant is repudiating the contract or one of its essential conditions and for that reason therefore I think that you will find in the pastures I have read that disobedience must at least have the quality that it is wilful, it does (in other words) connote a deliberate flouting of the essential contractual conditions”.

Further case law

63. The respondent drew my attention to two cases involving swearing *Futty vs D and D Brekkes* 1974 (which appears to be a tribunal case) *Wilson vs Racher* CA 1974 which was originally a county court wrongful dismissal case.

64. In *Racher* it was said that ‘the use of obscene language on a solitary occasion did not, against the background of the case, justify summary dismissal’. This was

even though the swearing was at the employer – the fact the employer had acted totally unreasonably was relevant.

65. It was said that the sole question which arises is whether the language most regrettably employed by the plaintiff constituted such conduct as made the continuance of the contract of service impossible. In that case the employee swore at the employer but it was in circumstances where the employer had launched a tirade against him for quite minor matters. It was said that the test was also the deliberate flouting of an essential contractual conditions.

66. The claimant also relied on *Bowater –v- North West London Hospitals NHS Trust* Court of Appeal 2011. Here a nurse had made what might be described a lewd comment in the course of trying to restrain a patient, the Court of Appeal upheld the Tribunal’s decision that it was an unfair dismissal, the Tribunal had said “to consider such a comment made in the circumstances in which it was made is sufficient in itself to deprive a nurse of her career in nursing cannot possibly be within the band of reasonable responses. In the majority view no reasonable employer would have failed to take into account the mitigating circumstances”.

67. They then went on to note that which included that she had not been trained, that she was at the end of a shift and volunteered to help, that the whole experience was very stressful, the comment was not directed at the patient, that most people would have considered it humorous, no member of the public overheard it, the claimant had a clean disciplinary record. Therefore it was not reasonable to dismiss in all the circumstances.

68. The Court of Appeal also said “I have no doubt that the majority of the ET were entitled to find that summary dismissal was outside the range of reasonable responses to the appellant’s conduct, the appellant made a misguided and wholly inappropriate remark intended as humorous, no member of the public was present, there was no evidence that the patient was conscious of it having been made, it is significant that neither Dr Kon nor Charge Nurse Lee admonished the appellant at the time or reported her conduct, the matter was not reported for some six weeks. The appellant’s conduct was rightly made the subject of disciplinary action, it is right that the ET etc should respect the opinions of the experienced professionals who have decided that summary dismissal was appropriate however having done so it was for the ET to decide whether their views represented a reasonable response to the appellant’s conduct, it did so ... in agreement with the majority of the ET I consider summary dismissal was wholly unreasonable in the circumstances of this case.

ACAS Code of Practice on Disciplinary and Grievance Procedures 2009

69. In accordance with Section 207 of the Trade Union and Labour Relations (Consolidation) Act the code is admissible in Employment Tribunal proceedings and the Tribunal is obliged to take into account any relevant provision of the code when determining the proceedings. In addition under 207A(2)

“if in any proceedings to which this section applies it appeared to the Employment Tribunal that:

- (a) the claim to which proceedings relates concerns a matter to which a relevant code of practice applies,
- (b) the employer has failed to comply with that code in relation to that matter and
- (c) The failure was unreasonable”

70. The Employment Tribunal may if it considers it just and equitable in the circumstances to do so increase any award it makes to the employee by no more than 25% and this uplift only applies to the compensatory award.

Conclusions

(1) BHS -v- Burchell Test

71. It is agreed that the respondent properly relied on conduct in this case. The first question is whether the respondent meets the BHS and Burchell test in that did they have reasonable grounds for a belief in the claimant's guilt. I find that the respondents did not form a genuine belief in the creation of a hostile intimidatory atmosphere being created by the use of IM messengers between two people in a private capacity. I find this because the respondents had a theoretical belief that because the claimant was messaging another person with flippant remarks which were somewhat unkind that this automatically would have led or must have led to an atmosphere of intimidation.

72. The respondent did not have evidence of this. They were aware that Rowena Goodwin had complained the claimant had assisted Sharon Gallagher on occasions in bullying her however Rowena Goodwin had not said there was an intimidation and hostile atmosphere and the only example she gave were in relation to work. The respondent had very limited information regarding any direct involvement by the claimant in bullying Miss Goodwin and therefore based their decision on this theoretical concept. I find that it is totally unreasonable for the respondent to make a leap from the messages to assuming that these would have been translated into a hostile and intimidatory environment.

73. In addition of course the investigation did not look at this issue and therefore there was insufficient investigation of the matter. It was also unreasonable to form this view i.e. that there was a hostile and intimidating environment without any evidence from anyone.

74. In addition the managers who had to have the matters reported to them stated that they did not believe that the matters Miss Goodwin was complaining about were harassment but they were more a clash of personalities with Sharon Goodwin. No one at all mentioned that there were any situations involving the claimant. Again there were no reasonable grounds to conclude the claimant was guilty of creating a intimidating and hostile environment.

75. It was also irrational for Mr McAllister and Mr Leggett both to decide that Rowena Goodwin was credible without meeting her or asking her any questions.

(2) Procedural Fairness

76. In relation to procedural fairness the process was unfair because (1) Mr McAllister was involved in a meeting which decided the matter should go to the disciplinary hearing and then he held the disciplinary hearing. (2) No one investigated whether or not people were using instant messaging in the way the claimant had done in general. (3) There was no discussion about the likelihood of somebody seeing the messages in either of the hearings and yet it was relied on in deciding the appeal.

77. In addition the claimant was not allowed to see any of the grievance interviews and no attempt was made to put any specifics to Rowena Goodwin. The respondent said that she said that she did not want to be involved in the process at all however reading her emails this is not at all clear and there was nothing to say she would not have answered some specific questions.

78. In addition the claimant had suggested the respondent should interview fellow employees Michelle Frakkar and Lisa Gaffney but the respondents failed to do this.

(3) General Unfairness

79. The respondents stated that they did take the claimant's mitigation into account but it was not sufficient to mitigate the seriousness of her offence. However, the claimant's mitigation was powerful and multi faceted as has been described in the Bowater case. In terms of that case the claimant's mitigation could be described as strong.

80. In addition the respondents said they looked at alternatives to dismissal however when it was put to Mr McAllister had he considered whether the claimant was likely to do it again which is the obvious question to ask he appears not to have considered this.

81. Whilst he agreed there was no evidence she would do it again he said there was no evidence she would not do it again. He had not explored this with the claimant at all and he was ignoring the indicators which suggested she would not do it again, for example she had said she would never do it again, that she had never been in any trouble before and that she was clearly remorseful and apologetic.

82. Accordingly I find that dismissal was not within the range of reasonable responses because the respondents failed to exercise proper judgment in regard to the claimant's mitigation and failed to properly consider alternatives to dismissal.

83. Accordingly I find the claimant's dismissal is unfair.

(4) Gross Misconduct/Wrongful Dismissal

84. I find that inappropriate use of the company's IM system was a breach of the respondent's policy but not such a serious breach as would be required to characterise it as gross misconduct. A serious breach would be the matters referred to as unlawful and illegal. Whilst that list included harassment in context I find this meant direct harassment. Accordingly this claim succeeds

Remedy

85. Regarding remedy submissions were made in relation to Polkey and contributory conduct and to whether there should be an uplift for failure to follow the ACAS code of practice.

86. I find in relation to this as follows:-

(1) Uplift re ACAS code of practice

The claimant relied on the matter not being dealt with promptly and not properly explaining to her the case against her. I do not accept these propositions on the basis that the issue was dealt with reasonably promptly, that the respondents had made the case clear to the claimant. I believe she genuinely misunderstood it and was confused and she was aided in that confusion by the fact that Mr Lancaster did not look at the second part of the claim, in fact that had not even been formulated at the time of the investigation. However taking everything into account I think it is not just and equitable to award an uplift.

(2) Polkey

In relation to Polkey I find that it would not be possible to say that the claimant could have been fairly dismissed because the defects with the procedure were so substantial as to make Polkey irrelevant.

(3) Contributory Conduct

In relation to contributory conduct I do think there is some contributory conduct here in that there was culpable and blameworthy conduct. The claimant failed to look at the policy that was her blameworthy conduct and whilst the respondents did not do any training on this the respondents had done something to make the claimant look at the policies by making sure that she had to click on a screen shot advising her of the policy before she could enter her computer. In addition she accepted that she knew at the time that the messages she was sending were not appropriate as she made efforts to make sure nobody could see them, accordingly even without seeing the policy she was aware that it was unacceptable conduct. It was the messages which led to the respondents considering disciplinary action against the claimant and it was partly because of those messages that she ended up in a disciplinary

hearing. Accordingly I consider there should be a reduction for contributory conduct of 25%.

- (4) I believe the parties have agreed the amount of compensation in terms of the arithmetical calculations and will be able to calculate the outcome on the basis of my findings in relation to remedy. If the parties are content that the case can now be resolved they are required to apply to the Tribunal within 14 days of this decision being promulgated to confirm whether the matter is settled or if a remedies hearing is required.

Employment Judge Feeney
28th February 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 March 2017

FOR THE SECRETARY OF THE TRIBUNALS